Supreme Court, U.S.
FILED

05-776 DEC 15 2005

OFFICE OF THE CLERK

No. ____

IN THE

Supreme Court of the United States

RICHARD DISHER, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioner,

v.

CITIGROUP GLOBAL MARKETS INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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December 15, 2005

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QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction, contrary to the holdings of three other circuits, to review a district court order remanding for lack of subject-matter jurisdiction a suit removed under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), notwithstanding 28 U.S.C. § 1447(d)'s bar on appellate review of remand orders based on lack of subject-matter jurisdiction and the district court's conclusion that petitioner's claims are not removable under SLUSA.

2. Whether the court of appeals erred in holding, in acknowledged conflict with three other circuits, that SLUSA preempts all claims brought by holders of securities, notwithstanding SLUSA's language limiting preemption to claims alleging "an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security" or the use of "any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security," and this Court's interpretation of identical language to cover only claims brought by purchasers or sellers in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975).

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Richard Disher respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

INTRODUCTION

This case involves two frequently litigated issues of securities law of vital importance to the administration of the federal courts and the investing community. The circuits are deeply divided on the jurisdictional and substantive questions presented. The Seventh Circuit's decision in this case conflicts with those of four other circuits and leaves shareholders like petitioner without a remedy for losses sustained because of an investment adviser's misconduct.

Petitioner is a customer of respondent Citigroup Global Markets Inc. ("Citigroup"). He sued respondent Citigroup in state court, alleging that Citigroup violated various state laws by negligently or intentionally issuing inaccurate investment research reports and ratings for various securities that he already owned. Citigroup rated these securities positively or neutrally when they actually warranted a negative rating. Relying on these falsely inflated ratings, petitioner, and other shareholders similarly situated, continued holding securities that lost most or all of their value.

Citigroup removed the lawsuit to federal district court and moved for dismissal under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). Petitioner moved for remand based on lack of subject-matter jurisdiction. The district court remanded the case to state court, concluding that it did not have subject-matter jurisdiction under SLUSA, because the claims were in connection with the retention or holding of securities, rather than "in connection with the purchase or sale of a covered security." 15 U.S.C. § 77p(b); *accord id.* § 78bb(f)(1).

On Citigroup's appeal of that remand order, the Seventh Circuit issued a decision involving two issues that independently warrant certiorari. First, the court held that 28 U.S.C. § 1447(d), which precludes appellate re-

view of remands based on a district court's conclusion that it lacked subject-matter jurisdiction, did not bar review of the order in this case. In reaching that conclusion, the Seventh Circuit relied on its recent decision in *Kircher v. Putnam Funds Trust*, 373 F.3d 847 (7th Cir. 2004) ("*Kircher I*"), which it "decline[d] to revisit." Pet. App. 4a. As the Seventh Circuit acknowledged in *Kircher I*, its decision created a conflict with the Second and Ninth Circuits, which have held that § 1447(d) bars review of a district court's remand order under SLUSA. *See Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116 (2d Cir. 2003); *United Investors Life Ins. Co. v. Waddell & Reed Inc.*, 360 F.3d 960 (9th Cir. 2004); *Abada v. Charles Schwab & Co.*, 300 F.3d 1112 (9th Cir. 2002). The Eleventh Circuit, in a case decided after *Kircher I*, has also rejected the approach adopted by the Seventh Circuit and has agreed with the Second and Ninth Circuits. *See Williams v. AFC Enters., Inc.*, 389 F.3d 1185 (11th Cir. 2004).

Second, after concluding that it had appellate jurisdiction, the court held that petitioner's claims were preempted. In so ruling, the court exacerbated a split with the Second, Eighth, and Eleventh Circuits. Those circuits hold that SLUSA's preemption provision – which preempts class-action securities fraud claims "in connection with the purchase or sale of a covered security" – does not apply to claims brought by *holders* of securities, as opposed to purchasers or sellers. *See Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25, 43 (2d Cir. 2005), *cert. granted*, 126 S. Ct. 34 (2005) (No. 04-1371); *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334 (11th Cir. 2002); *Green v. Ameritrade, Inc.*, 279 F.3d 590 (8th Cir. 2002). In those courts' view, the "in connection with" language of SLUSA has the same meaning as the nearly identical language in § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and its corresponding Rule 10b-5, 17 C.F.R. § 240.10b-5, which this Court has interpreted to cover only claims brought by

purchasers or sellers. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). The Seventh Circuit, by contrast, concluded – this time relying on its recent decision on the merits in *Kircher v. Putnam Funds Trust*, 403 F.3d 478 (7th Cir. 2005) ("*Kircher II*"), *petition for cert. pending*, No. 05-409 (U.S. filed Sept. 29, 2005) – that a class-action plaintiff need not be a purchaser or seller of securities for SLUSA to preempt his or her claims. *See* Pet. App. 8a-11a. This Court recently granted certiorari to resolve that issue in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, No. 04-1371 (to be argued Jan. 18, 2006).

The Seventh Circuit's decision actually goes further, because, when an investment adviser like Citigroup advises its clients to continue *holding* certain stocks, there is absolutely no "purchase or sale" of a security to which the adviser's conduct could conceivably be "connected." SLUSA, however, preempts only those state-law claims based on allegations of "an untrue statement or omission of a material fact *in connection with the purchase or sale of a covered security*" or "that the defendant used or employed any manipulative or deceptive device or contrivance *in connection with the purchase or sale of a covered security*." 15 U.S.C. § 77p(b) (emphases added); *accord* § 78bb(f)(1). By eliminating the requirement of any purchase or sale, the court below literally expunged the "purchase or sale" language in SLUSA, language that has a long and heavily litigated history.

Holder claims – the claims of persons who neither purchased nor sold securities – have existed for more than 50 years and with this Court's blessing for the last 30. *See Blue Chip Stamps*, 421 U.S. at 739 n.9 (noting availability of "remedies . . . to nonpurchasers and nonsellers under state law"). In *Kircher II*, the Seventh Circuit held that SLUSA preempts such holder claims, and now, in *Disher*, the court has gone even further, effectively eliminating altogether SLUSA's "purchase or sale" language.